Supreme Court, U.S.
FILED

No. _____

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In The

Supreme Court of the United States

THE STEARNS COMPANY, LTD.,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

BRUCE F. CLARK
Counsel of Record
JUDITH A. VILLINES
MICHELE M. WHITTINGTON
STITES & HARBISON PLLC
421 West Main Street
P.O. Box 634
Frankfort, KY 40602-0634
(502) 223-3477

CHARLES J. COOPER
DAVID H. THOMPSON
DAVID M. LEHN
COOPER & KIRK, PLLC
Suite 200
1500 K Street, N.W.
Washington, D.C. 20005
(202) 220-9600

Counsel for Petitioner

July 22, 2005

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

In 1937, petitioner sold to the United States the surface rights in some 35,000 acres of land, but retained the rights to the minerals below the surface and the right to enter and use the surface estate to extract the minerals. Over forty years later, the United States ousted petitioner from the surface, extinguished the easement, and appropriated for itself the right to exclude petitioner. The question presented by this case is:

Whether the federal government's appropriation for itself of an easement constitutes a per se taking giving rise to a ripe cause of action for just compensation under the Fifth Amendment.

PARTIES AND CORPORATE DISCLOSURE

There are no named parties other than those stated in the caption. The Stearns Company, Ltd., has no parent company and no subsidiaries or affiliates that have issued shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

The Stearns Company, Ltd., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") in this case.

OPINIONS BELOW

The Opinion of the Federal Circuit, decided January 28, 2005, is reported at 396 F.3d 1354 and reproduced in the appendix hereto ("App.") at 1a. The Order denying Stearns' Petition for Panel Rehearing or Rehearing En Banc, entered April 25, 2005, is unreported and reproduced at App. 93a.

The Opinion of the United States Court of Federal Claims ("CFC"), dated August 5, 2002, is reported at 53 Fed. Cl. 446 and reproduced at App. 9a. The Opinion of the CFC granting Stearns' Motion for Reconsideration, entered August 26, 2003, is reported at 58 Fed. Cl. 229 and reproduced at App. 80a.

JURISDICTION

This claim arises under the Tucker Act, 28 U.S.C. § 1491 (2005). The jurisdiction of the Federal Circuit was invoked pursuant to 28 U.S.C. § 1291 (2005). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (2005).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

Section 522(e) of the Surface Mining Control and Reclamation Act ("SMCRA"), 30 U.S.C. § 1272(e) (2005), reproduced at App. 98a.

STATEMENT OF THE CASE

A. Introduction

In contravention of more than a century of this Court's precedents, the Federal Circuit's ruling below holds that a government confiscation of an easement for its own benefit is not a compensable taking under the Fifth Amendment. Petitioner is a family-owned business that sold the surface rights to some 35,000 acres to the federal government nearly 70 years ago. Petitioner retained, however, the mineral estate and the right to extract coal under the land using deep-mining methods. In order to exercise this valuable right, it is undisputed that petitioner also retained an essential access easement to enter and use the surface estate to conduct deep-mining operations (e.g., construct roads and buildings). For decades, this régime remained in place, recognized and respected by the federal government.

In 1980, the federal government ordered petitioner's lessee to get off the land and to cease exercising petitioner's long-standing, state-recognized mining rights. The government, specifically the Office of Surface Mining ("OSM"), informed petitioner that under its newly adopted regulations, petitioner no longer had the right to utilize the surface to access its mineral estate, but rather could gain access to the surface only by obtaining the government's discretionary permission to do so.

Thus the government appropriated petitioner's *right* of access, thereby unifying in the government the sole right of access to the land and, concomitantly, the entire right to exclude *all* others, including petitioner. Petitioner was reduced to a potential licensee – with no more right to access and use the surface than a stranger to the property – and the mineral estate's marketability, and hence its value, was destroyed. Moreover, the government confiscated a

property right that petitioner had specifically refused to sell to the government, namely, the right to exclude petitioner *from the surface*. By claiming for itself "one of the most treasured strands in an owner's bundle of property rights," *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), the government effected a "classic taking in which government directly appropriates private property." *Lingle v. Chevron U.S.A. Inc.*, 125 S. Ct. 2074, 2082 (2005).

The CFC so held, finding that the government had effected "a physical taking by operation of law" when it "eliminated [petitioner's] traditional property rights" and "transferred" those rights to itself. App. at 11a, 17a. Judge Loren Smith based his ruling on this Court's decision in *United States v. Welch*, in which Justice Holmes explained that "[a] private right of way is an easement and *is land*." 217 U.S. 333, 339 (1910) (emphasis added). The rationale for this rule is well-illustrated by petitioner's case: the easement here plainly constituted a right to physically enter and occupy the surface. This Court in *Welch* and a long line of similar cases has treated the taking of an easement as a physical appropriation, and the lower courts have done likewise.

The Federal Circuit's decision did not address the government's eviction of petitioner's lessee from the surface or its extinguishment of petitioner's easement. Instead, the Federal Circuit ruled that petitioner's taking claim was merely regulatory in nature, and was not yet ripe for adjudication. Under the Federal Circuit's reasoning, no taking of the easement had occurred because the government might later grant permission to access the surface in the future for mining purposes (one mine at a time). But as the CFC succinctly put it, the possibility of "an act of governmental grace" does not somehow restore petitioner's property right. App. at 21a. The opportunity to seek permission to enter "is not the same as ownership" of the *right* to enter. App. at 10a, 20a.

Indeed, the irony in the decision below is palpable. The essence of an easement – its very purpose – is to secure the right of access to property without having to seek and obtain the landowner's permission. Yet, according to the Federal Circuit, petitioner cannot complain that its easement was taken until it does precisely what the easement entitled it not to do – seek the owner's permission to enter the land above its coal. The Federal Circuit's decision conflicts with the decisions of this Court and the other lower courts that have considered this issue. And in light of the Federal Circuit's special role as the arbiter of takings claims against the federal government, the Federal Circuit's dramatic departure from binding precedent is all the more significant.

The parties to this case agree that the decision below will have broad national ramifications. As a spokesman for OSM acknowledged, "[f]rom an agency perspective, this is probably the most significant 'taking' decision ever to come out of federal court." Lee Mueller, *Ruling on Unmined Coal Reversed*, LEXINGTON HERALD LEADER, Feb. 2, 2005, at D1 (quoting Jim Taitt). For example, for decades the federal government has been able to expand the national forest system (and other federal land holdings) by purchasing only the surface rights to millions of acres, leaving private citizens with ownership of the underlying coal and appurtenant access easements to exploit those mineral estates. In this way, the federal government has been able to purchase land at a fraction of the cost of buying the land in fee simple. If the government is allowed to extinguish and appropriate for itself such access easements without compensation by the simple expedient of holding out the possibility that it will later grant permission to enter and use the surface, then not only will the sales value of these privately retained mineral estates be lost, but property holders will be unwilling to part solely with the surface rights in the future. And, the decision below has similar implications for the myriad other contexts in which private easements are created by governmental (federal,